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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER COMPANY,
A Body Corporate, *Petitioner*,

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE FIRESTONE TIRE & RUBBER COMPANY AND McCREARY TIRE & RUBBER COMPANY AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE GENERAL TIRE & RUBBER COMPANY,
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v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company respectfully move for leave to file a brief as *amicus curiae* in opposition to the petition for writ of certiorari in this case.

This is a mandamus proceeding which arose out of Civil Action 12,932, *The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company* v. *The General Tire & Rubber Company*, pending in the United States District Court for the District of Maryland.

Amicus curiae are plaintiffs in Civil Action 12,932. *Amicus curiae* were intervenors in this mandamus proceeding before the appellate court.

Amicus curiae are the real adversary parties to the present action. The respondent District Judge is only a nominal adverse party.

Respondent is filing no brief in opposition to the petition for the writ of certiorari. Instead, respond-

ent is standing on the record and decisions below. Accordingly, unless the present motion is granted this court will have the benefit of no presentation by the real party in interest of the reasons why the petition should be denied.

Respondent has consented to the filing of an *amicus curiae* brief as proposed by this motion.

Petitioner has flatly refused to consent to the filing of the proposed *amicus curiae* brief. The obvious purpose of such refusal is to prevent the facts demonstrating why the petition should be denied from being presented to this Court.

Civil Action 12,932 is presently set for trial on April 15, 1964 subject only to the power of appellate courts to grant a stay. Respondent has stated unequivocally that no stay of the trial will be granted. The parties by stipulation have agreed to seek no further delay from respondent.

The petition is dilatory in character. Petitioner's *real purpose* is to force an adjournment of the April 15 trial date.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE OF THE FIRESTONE TIRE AND RUBBER COMPANY AND M CREARY TIRE AND RUBBER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This mandamus action arose out of Civil Action No. 12,932, *The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company* v. *The General Tire & Rubber Company*, pending in the United States District Court for the District of Maryland. Civil Action 12,932 is for a declaratory judgment of invalidity and non-infringement of patent 2,964,085.

Amicus curiae are plaintiffs in Civil Action 12,932. *Amicus curiae* were intervenors in this proceeding before the Appellate Court.

Amicus curiae pray that this Court issue no writ of certiorari to review the order denying mandamus entered by the United States Court of Appeals for the Fourth Circuit in this proceeding on January 7, 1964.

QUESTIONS PRESENTED

The *only* issue presented *to* the Fourth Circuit on mandamus was the propriety of certain *discretionary* orders by respondent. The *only* question which *can* be presented by this petition is whether the Appellate Court *erred in denying a writ of mandamus* to compel respondent to reverse his orders:

(1) Denying, *in his discretion*, a "renewed" motion to transfer Civil Action 12,932 in October of 1963 when the trial was set for January 7, 1964, *particularly when*

(a) Transfer had first been denied in July of 1961, and petitioner had made no effort to challenge the original transfer decision, but

rather had proceeded *for over two years* with exhaustive preparation for trial in respondent's Court;

(b) Petitioner, in January of 1963, indicated to respondent its desire and intention that the trial proceed in respondent's Court (R. App. II, Ex. C-2); and

(c) Petitioner, in January of 1963 selected respondent's Court as the most convenient in which to file Civil Action 14,333, a declaratory judgment action against the United States and a class including plaintiffs in Civil Action 12,932 involving the same license contracts and much of the same evidence as Civil Action 12,932, again emphasizing the propriety and petitioner's acceptance of the Baltimore forum.

(2) Refusing, *in his discretion*, to join the United States in Civil Action 12,932 under Rule 19(b), particularly when

(a) The United States does not manufacture tires or tread stock, has not been accused of infringement of and has never claimed a license under the patent involved in said civil action (R. Apps. III, Ex. E-3 and E-6, pp. 119-124);

(b) Respondent in April of *1962* had ruled that the Government was not an indispensable party to Civil Action 12,932 (Pet. 5a, R. App. II, Ex. B-5, pp. 66-67);

(c) Respondent on July 5, 1963 had dismissed Civil Action 14,333 brought by petitioner

against the United States for want of a justiciable controversy with respect to the same issue for which joinder of the United States in Civil Action 12,932 was sought (R. App. III, Ex. E-6, pp. 119-124);

(d) Respondent found as a basis for his refusal to join the United States that

> ". . . the Court does not feel that the Government is a necessary party, as that term is used in the Rule . . ." (Pet. 11a)

(e) Such joinder would materially delay the trial.

STATEMENT OF THE CASE

Petitioner is not interested in the merits of any question properly raised by this proceeding. Petitioner has failed in its efforts to transfer. It seeks to compensate for that failure by dilatory tactics designed to stall Civil Action 12,932, now set for trial April 15, 1964.

To that end petitioner has brought a motion in the Fourth Circuit seeking an order staying proceedings before respondent pending disposition of *this* petition. For the *same* purpose petitioner has filed a second petition for writ of mandamus in the court below. That second mandamus petition is based on an adverse ruling which petitioner knew would result from a tenuous issue first raised before respondent in January of 1964. Petitioner has stated that a second petition for writ of certiorari to the Fourth Circuit will be filed in this Court if the second mandamus petition is denied.

This entire series of appellate maneuvers is obviously an integral part of an over-all scheme of peti-

tioner to delay at all costs the trial and disposition of this action.

Civil Action 12,932 is a routine action for declaratory judgment of patent invalidity and noninfringement. The action arose in conventional manner. Petitioner, defendant in the declaratory judgment suit, is the owner of United States Patent 2,964,083 issued December 13, 1960. On the day the patent issued, petitioner sued Goodyear Tire & Rubber Company and United States Rubber Company in the Northern District of Ohio for patent infringement. Petitioner did not at that time file suit against *amicus curiae*, plaintiffs in Civil Action 12,932, namely, The Firestone Tire and Rubber Co. and McCreary Tire and Rubber Co. Petitioner did, however, charge that Firestone and McCreary were infringing its patent and threatened suit against them.

Because of petitioner's threats, *amicus curiae* jointly instituted Civil Action 12,932 in the Maryland District Court seeking a declaration under 28 U.S.C. 2201 that petitioner's Patent 2,964,083 is invalid and not infringed. As one ground of noninfringement, *amicus curiae* allege a license under Patent 2,964,083. *Amicus curiae* claim the license as nominees under a Government research contract pursuant to which petitioner granted a license to a United States agency and to its nominees.

Civil Action 12,932 was filed on March 30, 1961 in the Maryland District Court. Immediately thereafter, petitioner instituted separate infringement suits against both *amicus curiae* in the District Court for the Northern District of Ohio. In lieu of answer in Maryland, petitioner brought a motion to transfer or

alternatively to dismiss the Maryland action. *Amicus curiae* moved for an injunction against prosecution of the Ohio actions by petitioner. After extensive briefing of the motions and a hearing on July 6, 1961, respondent found that

> "In this case the facts and circumstances do not, in the Court's opinion, strongly favor, if they favor at all, a transfer."
>
> * * * * * * *
>
> "In the exercise of its discretion, the Court denies the motion to transfer.
>
> "The infringement claims in General v. Firestone and General v. McCreary and Carroll (in Ohio), could and should, except as to Carroll, be pleaded by way of compulsory counter-claims in this suit. The prosecution of these suits will, therefore, be enjoined with leave at any time to apply for dissolution of the injunction." (Pet. 13a-14a)

Petitioner did not seek review of this July 1961 ruling of respondent.

Instead, petitioner answered the Maryland declaratory judgment complaint and proceeded with the prosecution of the litigation in apparent good faith.

As early as July 16, 1962 respondent set a tentative trial date of October 1963 for the trial of Civil Action 12,962. (R. App. II, Ex. C-1).

In a letter to respondent dated January 3, 1963, counsel for petitioner stated:

> "Defendant joins with plaintiffs in requesting an early trial *at this court* on the issues of validity and infringement."

"I do not wish to start before Your Honor by asking for more time. It is rather my intention that the expression of Your Honor that the case be tried no later than October [1963] be fulfilled." (R. App. III, Ex. C-2)[1]

On January 4, 1963 petitioner instituted in the *Maryland* District Court, Civil Action 14,333 against the United States.[2] In that action petitioner sought a declaratory judgment that the United States *and its nominees* obtained no license under Patent No. 2,964,083. The United States promptly moved to dismiss Civil Action 14,333, *inter alia*, on the ground that no justiciable controversy existed between the parties. On July 5, 1963, after exhaustive briefing and a hearing, respondent granted the Government's motion to dismiss. On July 15, 1963 petitioner filed a request for rehearing (R. App. III, Ex. E-7). That request has been pending for some nine months with no effort to have it set down for hearing.

Instead, petitioner, on September 6, 1963, instituted in Civil Action 12,932 a motion to join the United States under Rule 19(b). At the same time petitioner brought an untimely renewed motion to transfer. Respondent, in his discretion, denied both motions on October 14, 1963.[3]

[1] Unless otherwise indicated, all emphasis is supplied.

[2] The facts surrounding the filing of the Government action are summarized in the opinion of the lower court and particularly in the first three paragraphs thereof. Pet. App. 5a; see also R. App. III, Ex. E.

[3] In the meantime, the trial date had been advanced to January 7, 1964 to accommodate respondent's docket.

Petitioner, on October 21, 1963, filed in the United States Court of Appeals for the Fourth Circuit a petition for writ of mandamus seeking review of respondent's discretionary denial of the "renewed" transfer and Rule 19(b) motions. It is the lower court's decision on that mandamus petition which gave rise to the present petition for writ of certiorari in this Court.

The Court of Appeals fully considered the complete record reflecting all of the relevant facts underlying the trial court's decision from which the mandamus petition was taken. As a result of such consideration, the Court of Appeals *denied mandamus* because there was no abuse of discretion by respondent on either the transfer or the Rule 19(b) issue.

With respect to transfer, the court below stated:

> "Finally, petitioner contends that the court has abused its discretion in refusing to transfer this case to Ohio under 28 U.S.C. § 1404(a) . . . we have no hesitation in saying that on the state of this record we will not issue a mandamus here." (Pet. 7a-8a).

On the Rule 19(b) issue, the court below held:

> "Petitioner's argument that Rule 19(b) leaves no discretion in the trial court to determine whether the United States was in this case a necessary party is likewise without merit . . . we find no such abuse of that discretion as would justify mandamus." (Pet. 7a)

It is these *discretionary* rulings of respondent, and *only* these *discretionary* rulings, which petitioner asks this Court to review.

ARGUMENT

Petitioner's Points 1, 2 and 5

Each of the self-serving generalities advanced by petitioner in its points 1, 2 and 5 is founded upon a false premise. None is worthy of the attention of this Court.

The granting of this petition would be squarely *inconsistent* with sound principles of judicial administration. Respondent's *discretionary* rulings are based upon the particular circumstances of Civil Action 12,932. They are in strict accord with all relevant precedent. There is no conflict. The decision below presents no problem with respect to "the administration of the Federal Courts" (Point 1) or "the Patent Laws of the United States" (Point 5).

The principles *here* controlling—and followed by respondent—were delineated by this Court in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 185, 96 L. Ed. 200, 203, 204 (1952). In that case this Court said:

> "The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, *an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.*

> "The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the courthouse, not a headstart. If he is forehanded, subsequent suits against him by the patentee can *within the trial court's discretion* be enjoined pending determination of the declaratory judgment suit, and a judgment in his favor bars suits against his customers."

Respondent in this action is a "disciplined and experienced" trial judge. Plaintiffs in Civil Action 12,932 were "forehanded" in 1961. Respondent, at *that* time, following the *Kerotest* mandate, enjoined belated compulsory counterclaim actions filed in Cleveland against plaintiffs in Civil Action 12,932 and refused to transfer. The case then proceeded for *over two* years in respondent's Court. Twice during that period petitioner indicated its acceptance of the Baltimore forum.

In denying the *renewed* transfer motion in October of 1963, respondent *again* exercised discretion in strict accordance with *Kerotest*. He refused, on the eve of trial, after exhaustive discovery pursuant to ground rules which he had delineated, to transfer Civil Action 12,932 to a forum generally unfamiliar with the case. Any other order would have resulted in an absurd and needless waste of judicial resources, substantial trial delay, and in gross injustice to *amicus curiae*.

As the court below noted, at the time the "*renewed*" transfer motion was denied by respondent in October of 1963:

> "... There is no evidence that the Ohio case can be reached at a substantial time in the future. Whereas

> this case is set for a firm date early next year.[1] The Court is thoroughly familiar with the issues. More than 25,000 pages of depositions and 18,000 pages of exhibits are in the record. Plaintiffs have been required to answer over 600 interrogatories. This work has proceeded under ground rules laid down by the district judge, who in ten full days of hearing must have acquired familiarity with the details of the case."[2]

Subsequent to January 7, 1964, the date of the decision below, respondent has conducted *at least nine additional* full days of hearing in open court in the nature of a pretrial proceeding and for the purpose of disposing of all outstanding discovery matters. The record of that pretrial hearing exceeds 1200 pages in length.[3]

A total of over *2200* interrogatories have now been responded to by both parties to Civil Action 12,932.

The trial date is now set for April 15, 1964. Respondent has stated unequivocally that *no* adjournment or stay of the trial will be *granted*. The parties have stipulated that no further delays in the trial will be *sought* from respondent.[4]

Wise judicial administration counsels against this Court's displacing with its own the judgment of respondent and of the court below.

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[1] The trial was then set for February 3, 1964.

[2] The pretrial hearing was held during the week of January 20-24, 1964 and during the week of March 23-28, 1964. The latter hearing was in progress at the time this brief was printed.

[3] The real purpose of this petition is to obtain such a stay—not to present any important question to this Court.

Far from an *abuse* of the Declaratory Judgments Act, this case is a prime example of the very type of action for which that act was designed. Firestone and McCreary are entitled to test the legitimacy of the charges of infringement leveled against them in a reasonable forum of their *own* choice. 28 U.S.C. 1404(a) did not amend 28 U.S.C. 2201 to restrict a declaratory judgment plaintiff's choice of forum to that previously selected by the patentee for infringement suits against third parties. The pendency of the Cleveland suits does not foreclose the exercise of discretion by respondent to deny transfer in the light of *all* relevant factors.

The belatedly *renewed* transfer motion which is the subject of the present petition was not brought until the action had been pending for almost two and one-half years, extensive discovery and pretrial proceedings had been conducted and the case was on the eve of trial. Petitioner has cited and *amicus curiae* are aware of no analogous case in which transfer has even been suggested.

Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 4 L. Ed. 2d 1540 (1960), is wholly inapposite.

In that case, the *discretionary* rulings of the trial judge were not challenged.

Continental was an admiralty case brought in New Orleans against a *vessel*. Transfer was sought to Memphis, Tennessee, where the same issue was involved in a case *already tried* against the *owner* of the vessel. The *vessel* itself could not have been sued in Memphis.

The *sole* issue before this Court was whether transfer was foreclosed as a matter of law by 28 U.S.C.

1404(a) as construed by this Court in *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L. Ed. 2d 1254 (1960). This Court's findings (Pet. 6) were premised upon its repudiation for the purposes of transfer motions of "a long standing admiralty fiction that a vessel may be assumed to be a person."

To the extent that *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 91 L. Ed. 1055 (1947) and *Kochring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (5th Cir. 1963), cited by petitioner (Point 2), are pertinent they support denial rather than granting of the petition.

In *Gulf Oil*, a *forum non conveniens* case, this Court upheld the trial court's *discretion* and emphasized the importance of the latter's consideration of *all* relevant factors. Respondent's decisions denying transfer in 1961 and 1963 were based on a discretionary consideration of all relevant factors.

Kochring was an appeal. It was not a mandamus action. The *facts* in *Kochring* were fundamentally different than in Civil Action 12,932. Transfer was not sought on the eve of trial. *Kochring* had not proceeded for two and one-half years in the transferor court. The party seeking transfer had *not* repeatedly indicated its approval of the original forum *before* the transfer was sought.

Spurious Venue and Jurisdiction Issues—Petitioner's Point 3

In connection with its "renewed" transfer motion in 1963, petitioner for the first time belatedly challenged venue. *If there had been a defect in venue, it had long before been waived.*

Moreover, venue was obviously proper *ab initio*. Civil Action 12,932 is a declaratory judgment action—

not "a patent infringement case."[7] Venue is controlled by 28 U.S.C. 1391(c)—not 28 U.S.C. 1400(b). Petitioner itself admitted as much at the time the *first* transfer motion was decided in July of 1961.[8]

In affirming respondent's ruling on venue, the court below joined every other court of appeals which has passed on the issue. The court said:

> ". . . In a declaratory judgment action alleging invalidity and noninfringement venue jurisdiction is controlled by 28 U.S.C. § 1391(c) and not by 28 U.S.C. § 1400(b). The overwhelming weight of authority is to this effect. *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F. 2d 774 (6 Cir. 1957); *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F. 2d 474 (3 Cir. 1942); *E. I. duPont de Nemours & Co. v. Byrnes*, 101 F. 2d 14 (2 Cir. 1939) . . . ." (Pet. 7a)

If this were *not* the law, any question of transfer would be foreclosed because this action could not have been brought against plaintiff McCreary in the Northern District of Ohio, where McCreary has no "regular and established place of business" as required by 28 U.S.C. § 1400(b). *See Hoffman v. Blaski*, 363 U.S. 335, 4 L. Ed. 2d 1254 (1960).

[7] Petitioner is forced to erroneously characterize this declaratory judgment action as "a patent infringement case" (Pet. 6) to argue the applicability of 1400(b) rather than 1391(c).

[8] In July of 1961 at the first transfer hearing before respondent counsel for petitioner distinguished this case from a "patent infringement suit" as follows:

> "This, however, your Honor, is a declaratory judgment suit. It is not bound by the Lummus decision at all. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 1 L. Ed. 2d 786 (1957). The venue is established by the general corporate venue. . . ." (R. App. I, Ex. A-7, p. 28)

There is no conflict either in decision or in principle between the consistent authority of the Courts of Appeal on this venue issue and the decisions of this Court in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 1 L. Ed. 2d 786 (1957), and *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 5 L. Ed. 2d 546 (1961). These cases are not in point. They concern venue in "patent infringement actions" brought by the *patentee* against the accused *infringer*. They have nothing to do with venue in declaratory judgment cases.

There was no venue issue in *Dresser Industries, Inc.* v. *Smith-Blair, Inc.*, 322 F. 2d 878 (9th Cir. 1963) cited by petitioner.

Petitioner advances a specious jurisdictional argument citing two licensee estoppel cases, *Bowers Mfg. Co.* v. *All-Steel Equipment Inc.*, 275 F. 2d 809 (9th Cir. 1960) and *Foster Wheeler Corp.* v. *Furnace Engineering Co.*, 46 F. Supp. 867 (S.D.N.Y. 1942). (Pet. 7). The court below disposed of this contention as follows:

> "... Petitioner argues that the plaintiffs' pleading of a license estops them to attack the validity of the patent and, therefore, removes the case from the area of patent litigation into the area of contract, thus requiring diversity between the parties for federal jurisdiction. This argument might bear considerable weight but for the fact that the defendant-petitioner denies the existence of a license. Under these circumstances, we seriously doubt that the doctrine of licensee-estoppel applies. Davis v. Buck-Jackson Corp., 230 F. 2d 655, 657 (4 Cir. 1956)." (Pet. 6a-7a)

The ruling of the court below is the only ruling possible consistent with good law and common sense. There is no conflicting authority.

Petitioner's Point 4

The ruling below that the trial court did not abuse discretion in refusing to join the Government under Rule 19(b) does *not conflict* with any case cited by petitioner.

The Appellate Court below properly disposed of the matter as follows:

> ". . . The court in effect held adversely to petitioner on its Rule 19(b) motion to make the United States a party in April of 1962 when it held that the United States was not an indispensable party to this suit and again by inference when it dismissed petitioner's separate suit against the United States on the grounds that no justiciable controversy existed between the petitioner and the Government. Now that an extensive amount of discovery has been completed and a firm date fixed for trial of the case on the merits petitioner labors under a difficult burden. . . ."
>
> * * * * *
>
> "Petitioner's argument that Rule 19(b) leaves no discretion in the trial court to determine whether the United States was in this case a necessary party is likewise without merit. Had the court found the United States to be a necessary party in order to accord complete relief to those already parties then, of course, no discretion is left in the court but to join under the terms of the statute. But, the preliminary question is clearly within the discretion of the court, and at this stage of the proceeding we find no such abuse of that discretion as would justify mandamus: *Curacao Trading Co. v. Federal Ins. Co.*, 137 F. 2d 911, 914 (2 Cir. 1943), cert. denied 321 U.S. 765 (1944)." (Pet. 5a-7a)

Rule 19(b) provides:

"(b) Effect of Failure to Join. When persons who are not indispensable, *but who ought to be parties if complete relief is to be accorded between those already parties*, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. . . ."

The "preliminary question . . . clearly within the discretion of the court" to which the decision below refers is, of course, the question implicit in the underlined portion of the rule.

In holding this matter to be discretionary, the court below was consistent with precedent. There is no conflict. There is no reason to grant the present petition.

Petitioner's cases are inapposite.

Ex Parte *Conroicay*, 178 U.S. 421, 44 L. Ed. 1134 (1900), involved a question of jurisdiction over a party—not a determination as to whether the party was necessary.

In *Shields* v. *Barrow*, 17 How. 130, 15 L. Ed. 158 (1855) the Court held that a case should not proceed in the absence of *indispensable* parties.

In *Stevens* v. *Bartholomew*, 222 F. 2d 804 (D.C. Cir. 1955), there was no ruling on the discretion of the lower court to determine whether a party is necessary.

CONCLUSION

No basis for the grant of a writ of certiorari has been advanced. Petitioner merely seeks a delay of the trial. The petition should be denied.

Respectfully submitted,

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